

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7082

ORIGINAL

To be argued by
SCOTT E. MOLLEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

BRITTA DANIELS as Trustee of the Testamentary
Trust under the Will of HENRY DANIELS, Deceased, and
BRITTA DANIELS, individually,

Plaintiff-Appellant,

v.

ERNST & ERNST,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF
THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Preliminary Statement

Defendant's effort to deny the existence of genuine issues of material fact is manifested in a two-fold tactic.

Firstly, defendant has completely ignored the settled precept that the Court "must resolve all ambiguities and draw all reasonable inferences in favor of the party

against whom judgment is sought" (*Heyman v. Commerce And Industry Insurance Co.*, 524 F.2d 1317, 1320 [2d Cir. 1975]).

To illustrate, throughout its brief defendant repeatedly alludes to the fact that in 1970 and 1971 plaintiff and her husband believed that misrepresentations had been made concerning Beck's financial condition (Def. Br., pp. 4, 5, 9, 25). Defendant is implicitly urging that such fact compels the conclusion that plaintiff and her husband were aware in 1970 and 1971 that defendant Ernst & Ernst knowingly made misrepresentations as contrasted with misrepresentations and puffing of Beck personnel which were made both orally to plaintiff's deceased husband during negotiations and which were contained in the President's Message embodied in the 1968 Annual Report (288a-294a).

Defendant's conclusion does not follow inasmuch as plaintiff has sworn that "when Beck stock dropped so precipitously, we certainly suspected that the statements *made by Beck personnel as to Beck's being a 'great company' with excellent growth potential were inaccurate*" (323a; emphasis supplied). In other words, a pure question of fact is presented as to whether plaintiff and her husband suspected Beck of misrepresentations as opposed to this defendant. The ambiguity on that issue is for the trier of the facts and cannot be resolved on the affidavits in this record.

The second tactic engaged by defendant is the citation of cases manifestly and materially distinguishable on their facts and therefore not controlling. In essence, defendant is asking this Court to hold as a matter of law on the basis of inapposite authority that the mere fact of subsequent knowledge by plaintiff and her husband of the financial collapse of the Beck empire was sufficient to put them on notice that an independent firm of accountants had in

a prior year, misrepresented Beck's financial condition. The cases relied upon by defendant do not support that proposition.

Indeed, the decision involving the most similar factual context, i.e., *Friedlander v. Feinberg*, 369 F. Supp. 917 (S.D.N.Y. 1974), aff'd. 508 F.2d 836 (2d Cir. 1975), discussed at pages 13 to 15 of plaintiff's main brief, held in principle to the contrary. Significantly, defendant has elected to skirt that decision through silence.

Each decision must turn on its own facts and the decisions cited by defendant at pages 16 to 21 of its brief are clearly distinguishable from and do not control the instant case.

Defendant's reliance on those cases is misplaced. Defendant's cases may be cited solely for the general propositions of law but not for the purpose of comparing or equating their fact patterns with the facts present in the instant case. No valid analogy can be drawn. It is axiomatic that every judicial holding that a particular fact pattern reflects or does not reflect a legal conclusion must be confined to that pattern. Any attempt to do otherwise is completely inappropriate. As Judge Fuld wrote in *People v. Olah*, 300 N.Y. 96, 101:

"No opinion is an authority beyond the point actually decided, and no Judge can write freely if every sentence is to be taken as a rule of law separate from its association."

Plaintiff contends that the cases cited by defendant contain one or more facts which were of material significance in those decisions which are not present in the case at bar.

Thus, in *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402 (2d Cir. 1975), this Court emphasized the fact

that the class action was not brought until December, 1972 notwithstanding that as early as August 27, 1969 a previous class action (the *Land* case) had been brought in the Southern District of New York on behalf of all persons similarly situated and that the *Land* case included twenty of the defendants in the *Berry* action, among whom was the independent firm of accountants Arthur Young & Co. Additionally, by December 4, 1969 nine other actions had been commenced in New York arising out of the same transactions which precipitated the *Berry* case and in 1970 and 1971, *Berry* and three of the four named plaintiffs had previously sued the corporation alleging essentially the same violation of Federal Securities Law. In fact, the Court observed ". . . That *Berry* I and *Berry* II are in essence, the same law suits. . . ." (518 F.2d at 405).

Moreover, not only did *Berry* involve a subsequent suit arising from the same transactions by the very plaintiffs who had commenced a virtually identical action in prior years, but *Berry* involved a context wherein even if the suit was not barred by the Statute of Limitations, all class members except four of the named plaintiffs would have been barred from prosecuting their action against any defendant who was also a defendant in the prior *Land* decision upon the ground that *Res Judicata* (518 F.2d at 411). Further, the *Berry* I class members had received notice of the *Land* action pursuant to class action procedure (518 F.2d at 412).

Notwithstanding the foregoing, at pages 12 and 13 of its brief, defendant attempts to bring this case within the factual ambit of the *Berry* case, stressing that in 1970 a Beck subsidiary brought an action against Beck on the ground of financial misrepresentations and that in 1971 a former member of the Beck board brought an action against Messrs. Glekel and McDevitt on the ground of misrepresentations. Defendant ignores the critical fact

that neither suit involved allegations of wrongdoing on the part of the independent accounting firm of Ernst & Ernst, whereas the *Land* decision relied upon in *Berry* included specific allegations of wrongdoing on the part of Arthur Young & Co.

Similarly, the decision in *Briskin v. Ernst & Ernst*, 398 F. Supp. 997 (C.D. Cal. 1975) is equally inappropriate. One of the principal distinctions between that case and the instant one is that the Court therein expressly found that plaintiffs were endowed with an extremely high degree of business sophistication. In that regard, the Court wrote at pages 1007-1008:

"However, all of the plaintiffs before us are experienced businessmen or lawyers, or both, who conducted intensive, thorough negotiations which extended for almost a year and culminated in the Beck-Sloane merger on September 26, 1969. Plaintiff Rothberg, who is both an attorney and businessman, had had 22 years of business experience at the time the negotiations with Beck were commenced in October 1968. Plaintiff Bernard Greenberg was and is a senior partner in a prominent Beverly Hills law firm, and he had long specialized in income tax and corporate matters when the Beck negotiations were commenced. Both of these men acted as agents for all the other plaintiffs, who were and are a close-knit family group. All the plaintiffs as a group of relatives, by blood or by marriage, delegated the responsibility for negotiating and concluding the Beck agreement to plaintiffs Rothberg and Bernard Greenberg, and to a lesser extent, to Irwin Greenberg and Marshall, Leo and Sheldon Siskin. Collectively, these six plaintiffs ~~had~~ four law degrees, two degrees in business administration and one degree in finance, and possess over 90 years

of combined business and legal experience. Plaintiffs also had the benefit of a team of expert legal, financial and business advisors throughout the negotiations."

The Court carefully circumscribed its decision by stressing that

"Had plaintiffs been novice investors or businessmen * * * the result here would perhaps be different". (at 1007)

As noted at pages 16 to 22 of plaintiff's main brief, this record would clearly support a finding that neither plaintiff nor her husband were sophisticated enough to have been put on constructive notice of any wrongdoing by Ernst & Ernst. At the very least, the question on this record is one of fact.

A further material factual difference between *Briskin* and this case lies in the *Briskin's* Court's emphasis that plaintiffs had been placed on actual notice well within the statutory period. Thus, the Court wrote at pages 1005-1006:

"Furthermore, Jack Wilder, one of the principal shareholders of Sloane to whom plaintiffs assigned the task of analyzing Beck's financial statements, made his considered reservations about Beck's financial condition very clear to plaintiffs and their representatives. Wilder refused to accept his share of the negotiated preferred Beck stock, and as a result, Sloane real estate was 'spun off' to him as his part of the transaction. He also stated to plaintiff Bernard Greenberg that one of the reasons he refused Beck preferred 'was his suspicion of the quality of Beck stock.'

Wilder was not the only one who was concerned about Beck's condition. After reviewing the May 4, 1970 prospectus, Aaron Eshman, financial advisor to those plaintiffs who belong to the Siskin family, clearly warned plaintiffs of Beck's grave financial problems. He told plaintiff Bernard Greenberg on May 12, 1970, that Beck had 'alarming debt' and a 'bad liquidity problem.' Plaintiff Siskin, who read the May 4, 1970 prospectus when it was issued, admitted that he realized Beck had 'an increasing need for cash,' that the information was 'adverse' and strongly affirmed that he would not have entered into the transaction with Beck if Beck had been burdened in September 1969, with the current liabilities shown in the prospectus of May 4, 1970."

There is no such proof of actual notice in this case.

Turner v. Lundquist, 377 F.2d 44 (9th Cir. 1967) is manifestly distinguishable as follows:

Turner

- (I) Plaintiff received actual notice.
- (II) Plaintiff had timely commenced an action "substantially in the same form" against a different defendant.
- (III) Plaintiff was a sophisticated investor.

Daniels

- (I) The record herein is absolutely devoid of similar actual notice.
- (II) No such similar prior action by the same plaintiff.
- (III) Record reflects evidence which clearly would support a finding that plaintiff was a non-sophisticated investor. (See pages 16-22 of plaintiff's main brief).

(IV) Plaintiff filed no controverting affidavit on his own behalf, nor were "... other controverting affidavits filed by or on behalf of Turner nor any other documentary or other evidence offered to establish material issues of fact of the Statute of Limitations question".

(IV) Plaintiff filed an affidavit of personal knowledge with supporting exhibits controverting defendant's contention as to the facts sufficient to commence the running of the Statute of Limitations. (320a-340a).

Finally, *Winkelman v. Blyth & Co., Inc.*, 394 F. Supp. 994 (D. Ore. 1973), aff'd. 518 F.2d 530 (9th Cir.), involved an action against a broker-dealer and an officer and salesman of the company on the ground that they had misrepresented the financial condition of Aesco, Inc. in selling shares thereof to plaintiffs between June 25, 1968 and March 5, 1969. The Court found that a letter sent by Aesco to all shareholders on June 12, 1969 supplied them with actual notice of possible wrongdoing by defendants.

The extremely short space of time between the sale of the stock and the actual notice by the Aesco letter was the crucial factor in the Court's determination. No such factor is present in the instant case. Further, the opinion is completely silent as to whether or not plaintiffs were sophisticated investors.

CONCLUSION

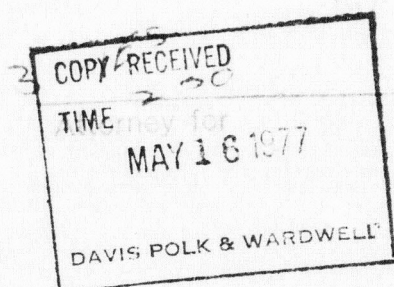
In view of all of the foregoing, plaintiff respectfully submits the existence of genuine issues of material fact mandates the reversal of the order granting summary judgment.

Dated: New York, New York
May 16, 1977

Respectfully submitted,

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